

KUCHING PLAZA SDN. BHD.

a

v.

BANK BUMIPUTRA (M) BHD.

SUPREME COURT, KUCHING
HASHIM YEOP SANI CJ (MALAYA)
MOHD. YUSOFF MOHAMED SCJ

b

MOHD. JEMURI SERJAN SCJ

[SC CIVIL APPEAL NO. 02-305-1990; 02-336-1990]

15 JUNE 1991

LAND LAW: *Order for sale - Whether circumstances just - Registered charge - Registered proprietor himself entered into a contract for sale - Whether can raise indefeasibility as defence to action for specific performance - Redemption monies paid directly to chargee by purchasers of individual shop Lots - Equitable estate - Terms of letter of undertaking - Recognition of rights of purchasers - Sarawak Land Code, s. 148.*

c

The 1st appellant borrowed RM5 million from the respondent, BBMB, in 1979 to build Kuching Plaza (the Plaza) on certain land (the said land). The loan was secured by way of first legal charge over the said land. Under the registered charge, the redemption of title was fixed at RM40,000 per shop lot calculated on the basis of RM5 million divided by 128 shop lots to be sold by the 1st appellant. Another important stipulation was that in the absence of strata titles to the shop lots, a request for release of loans to individual purchasers would be construed as a request for the discharge of title and the redemption of RM40,000 per title would apply.

d

The Land Office was authorised to only issue strata titles upon completion of all 3 phases of the Plaza. From 1979 to 1985, 122 lots in the shopping centre of the Plaza were sold to various purchasers, including the 2nd to 5th appellants. The 2nd appellant purchased 2 shoplots and obtained a loan from BCSB which released the redemption sum of RM80,000 direct to BBMB which in turn issued a letter of undertaking that the strata titles for the two lots would be released to BCSB. The 3rd, 4th and 5th appellants together purchased a shop lot and obtained a loan from BBMB which released a redemption sum of RM40,000 for the discharge of the shop lot from the main charge. The full purchase price was later paid by these purchasers.

e

f

In 1987, BBMB demanded from the 1st appellant approximately RM1.5 million as unpaid monies. As a result of KP's failure to reply, BBMB obtained, under s. 148(2)(c) of the Sarawak Land Code an order for sale of the said land inclusive of the shop lots already sold to the 2nd to 5th appellants.

g

The appellants' appeal against the order for sale was dismissed; hence this appeal to the Supreme Court, the contention being that BBMB, by its own stipulation and conduct, had looked to the purchasers to redeem the property charged and that it was not just in the circumstances for an order for sale to issue. BBMB raised the doctrine of indefeasibility of a registered charge as a defence.

h

Held:

[1] A registered proprietor who has himself entered into a contract for sale cannot set up indefeasibility as a defence to an action for specific performance of a contract of sale.

i

a [2] The evidence clearly indicates that as between BBMB and the 1st appellant, BBMB had looked towards the purchasers of these shop lots to redeem the property charged by the 1st appellant. BBMB itself had collected the redemption sums from those purchasers to satisfy the charge and it cannot now turn around and say that the 1st appellant had breached the term of payment for the loan.

b [3] Since BBMB had received the redemption sum and later the full purchase price from the 3rd to the 5th appellants, it had created an equitable estate carved out from the main charge in favour of the 3rd to 5th appellants.

c [4] The important aspect of the letter of undertaking issued by BBMB to BCSB is BBMB's recognition of the rights of each party to the document and the fact that BBMB acknowledged the redemption sum from the 2nd appellant and recognised the 2nd appellant's equitable estate to the charged property. Upon full settlement of the full purchase price by BCSB to BBMB, it is clear that BBMB is obliged to exclude, from the order of sale, the two shop lots owned by the 2nd appellant.

d [5] In this case, BBMB had recognised the rights of the 2nd to 5th appellants as purchasers and equitable owners of the shop lots and yet it chose to enforce the security on the charge over the rights of these appellants. Its conduct in the circumstances was plainly unconscionable and BBMB has not shown that the circumstances seemed just for it to seek an order for sale.

[Appeals allowed with costs.]

[Bahasa Malaysia Translation of Headnotes]

e **UNDANG-UNDANG TANAH:** *Perintah jualan - Sama ada keadaan-keadaan yang adil dan wajar - Cagaran berdaftar - Pemilik berdaftar menandatangani perjanjian jual beli - Sama ada pembelaan diatas dasar hakmilik yang tidak sangkal boleh dibangkitkan untuk menjawab tuntutan perlaksanaan tertentu - Wang penebusan balik dibayar terus kepada pemiutang oleh pembeli tapak kedai - Hak estet ekuiti - Syarat surat jaminan - Pengiktirafan hak pembeli - Kanun Tanah Sarawak, s. 148.*

f Pada tahun 1979, perayu pertama telah meminjam sebanyak RM5 juta daripada responden, BBMB, untuk membina sebuah Plaza. Tapak tanah Plaza itu dicagarkan kepada BBMB untuk memperolehi pinjaman tersebut. Cagaran itu menyarankan bahawa wang penebusan balik hakmilik ditafsirkan sebanyak RM40,000 setiap tapak. Satu syarat lain yang penting menetapkan bahawa jikalau hakmilik strata tidak dikeluarkan, permohonan untuk bayaran wang pinjaman kepada pembeli individu akan dianggap sebagai permohonan untuk perlepasan hakmilik. Bila ini berlaku, peminjam dikehendaki membayar RM40,000 untuk menebus balik hakmiliknya (redemption of title).

g Pejabat Tanah diberi kuasa untuk mengeluarkan hakmilik strata hanya apabila ketiga fasa pembangunan disiapkan. Di antara tahun 1979 dan 1985, sebanyak 122 tapak telah dijual. Perayu kedua telah membeli 2 tapak kedai dengan pinjaman dari BCSB yang telah membayar wang penebusan balik (redemption monies) sebanyak RM80,000 terus kepada BBMB. Sebaliknya, BBMB telah memberi surat jaminan (letter of undertaking) kepada BCSB bahawa hakmilik strata untuk kedua-dua tapak akan diberi kepada BCSB.

h Perayu ketiga, keempat dan kelima telah membeli satu tapak dan memperolehi pinjaman dari BBMB, yang juga telah mengeluarkan wang penebusan balik hakmilik sebanyak RM40,000 untuk melepaskan (discharge) tapak tersebut dari cagaran utama. Perayu ketiga, keempat dan kelima telah menjelaskan dengan penuh, harga belian tapak yang dibeli oleh mereka.

i

Pada tahun 1987, BBMB telah menuntut dari perayu pertama, wang sebanyak RM1.5 juta ringgit yang dihutang. Oleh sebab perayu pertama gagal menjawab tuntutan tersebut, BBMB telah memperolehi perintah jualan (order for sale) terhadap tapak Plaza itu di bawah s. 148 Kanun Tanah Sarawak. Perintah tersebut juga merangkumi tapak kedai yang dibeli oleh perayu kedua, ketiga, keempat dan kelima. **a**

Rayuan perayu terhadap perintah jualan telah ditolak dan ini adalah rayuan daripada keputusan itu ke Mahkamah Agung. Perayu membawa bantahan bahawa perintah jualan ini tidak patut dikeluarkan kerana keadaan-keadaan di sini adalah tidak adil dan wajar dan bahawa BBMB, dengan tindakannya sendiri, telah menuntut penebusan balik tanah yang dicagar daripada pembeli. **b**

BBMB telah berhujah membangkitkan pembelaan berdasarkan doktrin hakmilik yang tidak boleh disangkal (indefeasibility) yang diperolehi apabila cagaran didaftarkan. **c**

Diputuskan:

[1] Tuanpunya yang telah berdaftar (registered proprietor) yang telah sendirinya menandatangani perjanjian jual beli tidak boleh membangkitkan sebagai pembelaan, hakmilik yang tidak boleh disangkal, untuk menjawab tuntutan perlaksanaan tertentu (specific performance) perjanjian jual beli. **d**

[2] Diantara BBMB dan perayu pertama, keterangan dengan jelasnya menunjukkan bahawa BBMB telah menganggap bahawa pembeli tapak kedai tersebut akan menebus balik tanah yang dicagar oleh perayu pertama. BBMB juga telah menerima wang penebusan balik daripada perayu dan tidak boleh sekarang membawa alasan bahawa perayu pertama telah gagal mematuhi syarat pembayaran pinjaman tersebut.

[3] Apabila bayaran penebusan balik dan bayaran penuh diterima oleh BBMB, wujudnya hak estet ekuiti (equitable estate) untuk perayu ketiga, keempat dan kelima. **e**

[4] Aspek penting surat jaminan dari BBMB kepada BCSB ialah pengiktirafan hak-hak semua pihak yang telah menandatangani perjanjian jual beli, pengakuan BBMB bahawa ia telah menerima wang penebusan balik dari perayu kedua dan pengiktirafan oleh BBMB bahawa wujudnya hak estet ekuiti perayu kedua terhadap tanah yang dicagar. Bila BBMB menerima bayaran penuh daripada BCSB, BBMB diwajibkan mengecualikan 2 tapak kedai kepunyaan perayu kedua daripada perintah jualan. **f**

[5] Dalam kes ini, walaupun BBMB telah mengiktiraf hak perayu kedua, ketiga, keempat dan kelima sebagai pembeli dan pemilik di sisi ekuiti, BBMB masih ingin menguatkuasakan jaminan di bawah cagaran dengan tidak mengambilkira hak-hak perayu. Tindak-tanduk pihak BBMB di dalam keadaan begini tidak adil dan wajar dan BBMB tidak berjaya membuktikan bahawa keadaan kes ini boleh menyokong tindakan memohon perintah jualan. **g**

[Rayuan dibenarkan dengan kos.]

Cases referred to:

- | | |
|--|---------------------------------|
| <p><i>Chua Hee Hung v. QBE Supreme Insurance Bhd.</i> [1990] 1 CLJ (Rep) 49 (foli)</p> <p><i>Lian Keow Sdn. Bhd. (In Liquidation) & Anor. v. Overseas Credit Finance (M) Sdn. Bhd. & Ors.</i> [1988] 2 MLJ 463 (foli)</p> <p><i>Oh Hiam & Ors. v. Tham Kong</i> [1980] 2 MLJ 159 (foli)</p> <p><i>Phillips v. Martin</i> [1980] 11 LT (NSW) 153 (foli)</p> <p><i>Public Finance Bhd. v. Narayanasamy</i> [1971] 2 MLJ 32 (foli)</p> <p><i>Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors.</i> [1983] CLJ (Rep) 387 (foli)</p> <p><i>Tataurangi Tairuakena v. Mua Carr</i> [1927] NZLR 688 (foli)</p> <p><i>Temenggong Securities Ltd. & Anor. v. Registrar of Titles & Ors.</i> [1974] 2 MLJ 47 (foli)</p> | <p>h</p> <p>i</p> |
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- a** **Legislation referred to:**
National Land Code 1965, s. 340
Land Code (Cap 81) (Sarawak), ss. 132, 148(2)(c)
SCCA. 02-305-90
For the appellant - Cheng Yi; M/s. Matthew T.K. Chan & Co.
For the respondent - Walter Dior; M/s. Dior & Co.
- b** SCCA. 02-336-90
For the 1st appellant - Cheng Yi; M/s. Matthew T.K. Chan & Co.
For the 2nd, 3rd, 4th, 5th appellants -David L.K. Sio (Earnest Chua with him); m/s. Earnest Chua & Co.
For the respondent - Walter Dior; M/s. Dior & Co.
- c** **[Editor's Note:** The following case was consolidated and heard together at this Supreme Court sitting:
Kuching Plaza Sdn. Bhd. & 4 Ors. v. Bank Bumiputra Malaysia Bhd. (Supreme Court Civil Appeal No. 02-336-1990).]

JUDGMENT

- d** **Mohd. Yusoff Mohamed SCJ:**
The chargor, the 1st appellant in SCCA.02-336-90 (hereinafter referred to as the 1st appellant) and the 4 interveners who were purchasers, (hereinafter referred to as 2nd to 5th appellants) of shop lots in the charged land comprising of a building known as Kuching Plaza appealed against the order for sale granted to Bank Bumiputra Malaysia Bhd (hereinafter referred to as the respondent) by the learned Judge under s. 148(2)(c) of the Sarawak Land Code (Cap. 81). Both these appeals were consolidated at the hearing.
- e** The facts relevant to the issue in both the appeals are as follows.
- The 1st appellant borrowed a sum of RM5 million from the respondent, at its Kuching Branch in 1979 to build the Kuching Plaza, (the Plaza), on Lot 16 Section 30, Kuching Town Land District on the term that the land was to be secured by way of first legal charge for the loan.
- f** The memorandum of charge was duly executed and registered as Instrument No. L 10145/1979 on 10 October 1979.
- The term of repayment of the loan stipulated by the respondent was that the redemption of title would be at RM40,000 per shop lot calculated on the basis of RM5 million divided by 128 shop lots to be sold by the 1st appellant. It was also a condition stipulated by the respondent that in the absence of strata titles to the shop lots a request for release of loans to individual purchasers would be construed as a request for the discharge of title and that the redemption of RM40,000 per title would then apply.
- g** The basis of building approval of the Plaza by the State Government to the 1st appellant was that strata titles would be issued by the Land Office only upon completion of all the three phases of the building, the shopping centre, the podium and a tower block. In 1979 only the shopping centre had been completed and between that date to 1985 some 122 lots in the shopping centre had been sold to various purchasers. The 2nd to 5th appellants were among them.
- h** The 2nd appellant purchased two shops, Lots 143 and 144 on 19 August 1983. He obtained a loan from the Bank of Commerce Sdn. Bhd. By an arrangement with the respondent, the bank on 6 October 1983 released the redemption sum of RM80,000 direct to the respondent
- i**

for the two shop lots on behalf of the 2nd appellant. Consequently, the respondent issued a letter of undertaking that the strata titles for the two lots would be released to the Bank of Commerce. **a**

The 3rd, 4th and 5th appellants together purchased one shop lot No. 236 on 13 October 1980. They obtained a loan from the respondent in the sum of RM109,900. On 19 May 1981 the 3rd to 5th appellants requested the respondent to release the redemption sum of RM40,000 from the loan for the discharge of the shop lot from the main charge in accordance with the respondent's stipulation. By 28 December 1983, the whole loan was settled by the 3rd to 5th appellants. **b**

It is not disputed that the 2nd to 5th appellants have been in possession of these shop lots since their purchase.

On 14 January 1987, the respondent contended that the loan remained unpaid by the 1st appellant was RM1,531,858.86 with interest chargeable at 14.75% per annum. The respondent demanded payment from the 1st appellant but there was no reply. **c**

On 31 March 1987 upon statutory notice served on the 1st appellant the respondent applied for order for sale. The sale was to include the shop lots already sold to the 2nd to 5th appellants. **d**

The learned Judge dealt with the issue by determining on the indefeasible interest of the respondent on the charged land as registered proprietor as provided in s. 132 of Sarawak Land Code. Referring to the section in his judgment the learned Judge states:

However, it is clearly established in law that upon registration of a charge the party in whose favour the registration has been effected will obtain an indefeasible title to or interest in the land. (See *Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors.* [1983] CLJ (Rep) 387). No doubt *Tai Lee's* case is in respect of the provisions of the National Land Code 1965 whereas over here we have the Sarawak Land Code but an examination of the wordings of s. 132 of the Land Code (Cap. 81) and s. 340 of the National Land Code 1965 though they are not the same, in my view, the legal effect cannot be said to be different. **e**

And he held that:

As actual fraud is not established in this case there is nothing to prevent the plaintiff from obtaining an order of the Court for sale. **f**

In this appeal it was argued on behalf of the appellants that the respondent by its own stipulation and conduct had looked to the purchasers to redeem the property charged and not the 1st appellant. They contended that none of them had denied or challenged the indefeasible title of the respondent in the charged property. They urged that on the evidence, the circumstances were not just to grant an order for sale as provided in s. 148 of the Sarawak Land Code. **g**

The respondent on the other hand argued that the 2nd to 5th appellants had alleged fraud against the respondent whereby the issue of indefeasibility of title would become relevant and material to the respondent's case. **h**

We have examined the evidence ourselves and we find that the appellants in their affidavits do not appear to challenge the validity of the charge created in favour of the respondent that calls upon the learned Judge to decide on the indefeasible interest of the respondent. These affidavits deposed to the facts of their transactions with the respondent and contentions by the deponents that the respondent had reneged on its bargain which was not disclosed to the Court when the application for sale was made. **i**

a On the argument by the respondent that the doctrine of indefeasibility can be raised as a defence, the authorities seemed to be to the contrary.

In New Zealand, the Court there held as well settled that a registered proprietor who has himself entered into a contract for sale of land cannot set up the indefeasibility of his title as a defence to an action for specific performance of a contract. Skerrett CJ in delivering judgment of the Court in *Tataurangi Tairuakena v. Mua Carr* [1928] NZLR 688 at 702 observed:

b The provisions of the Land Transfer Act as to **indefeasibility of title have no reference either to contracts entered into by the registered proprietor himself or to obligations under trusts created by him** or arising out of fiduciary relations which spring from his own acts contemporaneously with or subsequent to the registration of his interest. (Emphasis is mine).

c In Australia, the N.S.W. Court would uphold as against a registered proprietor unregistered equitable interest created by himself. Darley CJ in *Phillips v. Martin* [1980] 11 LR (NSW) 153 said:

d The Court will accordingly **uphold, as against a registered proprietor, unregistered equitable interests created by himself**. Thus, if A, a registered proprietor, contracts to sell his land to X, he cannot repudiate the contract on the ground that the Act gives him an indefeasible title. It is to my mind a clear principle of equity, and I have no doubt there are abundant authorities on the point, that equity will interfere to prevent the machinery of an Act of Parliament being used by a person to defeat equities which he has himself raised, and to get rid of a waiver created by his own acts. (Emphasis is mine)

e *Oh Hiam & Ors. v. Tham Kong* [1980] 2 MLJ 159 is our authority to say that our Court would hold that the indefeasible title would not preclude an order for specific performance of a contract for sale by the proprietor. Lord Russell of Killowen in delivering judgment of the Court said:

f It was contended by the defendant that this means what it says: he being on the register his title is indefeasible and accordingly the Court cannot take it away from him, since it was neither alleged nor proved that there was fraud or misrepresentation to which he was a party, nor that his registration was obtained by forgery or by means of an insufficient or void instrument.

Apart from authority their **Lordships would not expect that the intervention of equity by a remedy in personam based upon a transaction to which the plaintiff and defendant were parties would be ousted by such provisions.**

And further he continued:

g **The indefeasible title would not preclude an order for specific performance of a contract for sale by the proprietor.** All these are instances of equity acting *in personam*, and indeed the order in the instant case may be described as an order *in personam* that the registered proprietor should defeat his own title.

h There was moreover a number of authorities which deny to the Torrens system the effect for which the defendant contends, where there is not merely a question of competitive claims to the title, but a relationship between the parties justifying intervention by equity acting in personam. (Emphasis supplied)

Now s. 148 Land Code (Cap. 81) dealing with order of sale provides:

i 148 (1) If default be made in the payment of the principal sum, interest or other moneys secured by a charge, or in the observance of any agreement, expressed or implied in any charge, the chargee may give to the chargor, his personal representatives or assigns, notice in writing that the chargee will resort to all available remedies unless such default be remedied.

(2) If the chargor fails to comply with the requirements of any notice lawfully given, the chargee shall be at liberty to apply to the High Court: **a**

(a) -not relevant -

(b) -not relevant -

(c) for the sale of the charged land.

and **the Court after hearing the evidence may make such order as in the circumstances seems just.** (Emphasis supplied) **b**

It is common ground that the power to grant the order for sale under the section is discretionary.

The phrase “circumstances seems just” would seem to raise the question what are the circumstances existing that would make the order for sale not seem just. **c**

Two sets of circumstances were in existence when the respondent sought to foreclose on the security in the charged property. Firstly, its legal relationship as chargee with the 1st appellant as chargor and secondly, the circumstances governing the sale of shop lots in the charged property to the 2nd to 5th appellants.

First the relationship between the 1st appellant, the chargor and the respondent, the chargee, it is pertinent to consider the relevant term of repayment of the loan stipulated by the respondent in its letter of 24 July 1979, reproduced below: **d**

7. Repayment:

(a) Bridging Finance

To be settled completely within two (2) years. Redemption of title shall be on the basis of RM5.0 million divided by 128 shoplots = RM39,062.50 rounded to **RM40,000 per shop lot.** In the event that the account was in excess when release of title is required, all the excesses must first have been settled. **e**

(b) End-Finance

- not relevant -

NB:

Request for release of end-finance for individual loanees in the absence of Strata Titles shall be construed as a request for discharge of title. Redemption sum of RM40,000 per title is then applicable. **f**

This term of repayment stipulated by the respondent itself seemed crucial to the respondent’s case. It seems to be the term of its contract that payment for the redemption of title of the charged property were to be derived from the sale of 128 shop lots at the Plaza and not from the 1st appellant. And as further indicated in the foot-note of the letter, the redemption sum of RM40,000 per shop lot sold, was to be paid by the purchasers directly to the respondent and not to the 1st appellant. **g**

This is made clear from the respondent’s solicitor’s letter of 19 May 1981 showing that the respondent dealt directly with the 3rd to 5th appellants when it collected RM40,000 as redemption sum for the charged property. **h**

The director of the 1st appellant company Datuk Sim Kheng Lung’s affidavit deposed to the fact that of the 116 shop lots at Kuching Plaza sold, the respondent dealt in similar manner with the purchasers in respect of the redemption sum collected by the respondent. **i**

- a* The inevitable conclusion which can be deduced from these evidence is that the respondent had looked towards the purchasers of these shop lots to redeem the property charged by the 1st appellant. The evidence shows that the respondent itself had collected the redemption sums from those purchasers to satisfy the charge. Therefore it cannot now turn around to say that the 1st appellant had breached the term of payment for the loan. These, in our view, are valid circumstances and the Court should consider whether it would seem just for the respondent to foreclose the charge in the 1st appellant's hand.
- b*

Secondly, the circumstances governing the relationship between the respondent and the purchasers:

Purchaser of Lot 236

- c* It is observed that the respondent's solicitor Loke, King & Co. had acted as common solicitor to the 3rd to the 5th appellants in relation to the loan facility for the purchase of shop Lot 236 granted by the respondent. This is evidenced by the solicitor's bill of 27 February 1984 claiming for its professional services rendered to the 3rd to 5th appellants.

One of the letters written by the solicitor relating to the loan referred to the release of redemption sum to the respondent for the discharge of Lot 236 from the charge. It is relevant to reproduce the letter as hereunder:

- d*
- Loke, King & Co.
Advocates
- KCK/B472/81
FL/MC/81/1
- e*
- The Manager
Bank Bumiputra Malaysia Bhd
Kuching.
- Dear Sir,
- f*
- Re: Deed of Assignment & Loan Agreement - Private Lot 236 of Kuching Plaza Sdn Bhd.
- Lim Tohia Joo, Dennis Lim Ngian Seng @ Lim Chan Choon & Michael Lim Nyang
Tak - Loan of RM109,900

19 May 1981

- g*
- We refer to your letter dated 13 May 1981.
- We wish to advise that we have presented copies of loan agreement and deed of assignment to the office of hire purchase agreements, Kuching for registration. A copy each of the said documents will be forwarded to you after registration. We further wish to advise that the said documents are registrable upon presentation.
- You may proceed to disburse the fund.
- We note that **request for release of fund** for this individual loanee in the absence of Strata Title, shall operate and be construed as a request for **discharge of shoplot 236 from Charge Instrument No. L. 10145/79**. Redemption sum of RM40,000 per shoplot is applicable. (Your letter OD/FL/MC/G/79 dated 30 July 1979 to us refers). (Emphasis is mine)
- h*

Yours faithfully,
sgd.

c.c. The Director
Kuching Plaza Sdn Bhd
Kuching

i

The Deputy General Manager
Credit Administration Dept.
(Follow-up)
Bank Bumiputra Malaysia Bhd
21 Jalan Melaka
Kuala Lumpur.

a

Having in fact received the redemption sum and later the full purchase price for the shop Lot 236, the respondent had in our view created an equitable estate carved out from the main charge in favour of the 3rd to 5th appellants in respect of the shop lot purchased by them.

b

Purchaser of Lots 143 & 144

The 2nd appellant obtained a loan from a different source, the Bank of Commerce Bhd. for the purchase of shop Lots 143 and 144. But having received the redemption sum of RM80,000 for the two shop lots, the respondent issued a deed of undertaking to the Bank of Commerce Bhd. The relevant parts of the deed dated 5 October 1983 are these:

c

And whereas by a memorandum of charge registered as Instrument No. L. 10145/79 on 10 October 1979, at the Kuching Land Registry Office, the vendor charged the said land in favour of the bank in consideration of a loan for RM5,000,000 (Malaysian Ringgit Five Million only).

d

And whereas the vendor and the purchaser have entered into 2 agreements dated 19 August 1983, for the sale by the vendor to the purchaser of the shop spaces numbered as Private Lots No. 143 and 144 in the site plan attached hereto and bordered red (hereinafter referred to as "the said shops") being part of all the building erected on all that parcel of land situate at McDougall Road, Kuching, Sarawak, containing an area of 1.394 acres more or less, and described as Lot 16 Section 30 Kuching Town Land District (as more particularly set out in the plan attached hereto), in the sum of Malaysian Ringgit Three hundred and sixty thousand only (RM360,000) (hereinafter referred to as "the purchase price").

e

And whereas the parties hereto are all desirous of **arranging for the direct payment** by the lender to the bank of Malaysian Ringgit Eighty Thousand only (RM80,000) **being the redemption sum due to the said shops.** (Emphasis is mine)

f

Now it is hereby agreed as follows:

1. In consideration of the lender whenever making payment to the bank of the said sum of Malaysian Ringgit Eighty Thousand only (RM80,000) for the redemption of the said shops the bank doth hereby agree and undertake to release to the lender the documents of Strata Title to the said shops within two (2) weeks from the date of receipt of the same from the Land and Survey Department, Kuching.

g

The important aspect of this deed is the respondent's recognition of the rights of each party to the document. What we are concerned for the moment in respect of the deed, is the respondent's acknowledgement of the redemption sum from the 2nd appellant and its recognition of the 2nd appellant's equitable estate to the charged property. Obviously upon settlement of the full purchase price by the Bank of Commerce to the respondent, it obliges the respondent to exclude the two shop lots from the order for sale.

h

The existence of equitable estate has been recognised by our Court in circumstances where the purchaser in sale and purchase agreement has paid the full purchase price and has taken possession of the property.

i

- a** In *Temenggong Securities Ltd. & Anor. v. Registrar of Titles & Ors.* [1974] 2 MLJ 47, Ong Hock Sim FJ said:

The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants are bare trustees for the appellants of the said land and it must consequently follow, as night must day, that the vendors have no interest in the lands.

- b** And further he said:

We are in agreement with the majority view in *Karupiah Chettiar v. Subramaniam* where it was “Held: (1) in this case Mohamed Sharjudin having sold his entire interest in the land and received payment in full held the legal estate only as a bare trustee for the respondent, who are the equitable owner;”

- c** In *Lian Keow Sdn. Bhd. (In Liquidation) & Anor. v. Overseas Credit Finance (M) Sdn. Bhd. & Ors.* [1988] 2 MLJ at 463 Syed Agil Barakbah SCJ in distinguishing the registered interest in the National Land Code and the equitable interest in land observed:

- d** It is important to note that the doctrine of English equity does not apply with equal force to the system of registration of title to land contained in the Code. The distinction between registered and unregistered interest in land under the Code is different from that in the English law between legal estates and equitable interests in land. The Code restricts the kinds of interests in land which are capable of being registered, but at the same time it does not prevent or restrict the creation of beneficial interest in land by way of equitable trust. The position is made clear from some authorities on the matter. Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right *in personam*, that is, he acquires the right to the land as against the vendor personally but not good against the whole world...

- e** And in a very recent case *Chua Hee Hung v. QBE Supreme Insurance Bhd.* [1990] 1 CLJ (Rep) 49, Lee Hun Hoe CJ (Borneo) entertaining the same view said:

In our case, it is not the caveat which confers on the purchaser a better claim but the prior equitable interest which the purchaser obtains under the contract of sale. This equitable interest is not lost by the fact that the appellants delayed in registering their interest...

- f** Ong CJ (M) in *Public Finance Bhd. v. Narayanasamy* [1971] 2 MLJ 32 called this equitable estate as the purchasers’ inchoate rights against the respondent and said that the sub-purchasers had fulfilled their part of the contract and nothing remains but for the respondent to execute transfers to them when separate titles are issued. The relevant part of the judgment is as hereunder reproduced:

- g** It is crystal clear that the object of these three sub-purchasers was to claim ownership of 45 acres in all and to have the same excluded from any order of sale made by the Court.

We have no doubt whatever in our mind that they are entitled to a decree of a specific performance against the respondent. They had fulfilled their part of the contract and nothing remains but for the respondent to execute transfer to them when separate titles are issued.

- h** And further:

The simple answer is that the appellants were aware of their inchoate right against the respondent and the completion by them in due course may be fully expected by reason of the substantial sums already paid. What matters is that at the time the appellant applied for an order of sale the three sub purchaser were beneficial owners of their 45 acres. By their intervention they merely asked that their legal rights should be recognised.

- i**

In the present case the respondent had recognised the rights of the 2nd to 5th appellants as purchasers and equitable owners of the shop lots and yet it chose to enforce the security on the charge over the rights of these appellants. Its conduct in the circumstances was plainly unconscionable.

It is in our judgment established by the authorities that the respondent has not shown that circumstances seemed just for him to seek the order for sale.

In the result both these appeals are allowed with costs to the appellants. Deposits to be refunded to the parties concerned.

Also found at [1991] 3 CLJ 1702

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